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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Roy and Josie Fisher, et al.,
Plaintiffs

and
United States of America,
Plaintiff-Intervenor,

v.
Tucson Unified School District, et al.,
Defendants,

and
Sidney L. Sutton, et al.,
Defendants-Intervenors,

No. CV-74-00090-TUC-DCB
(Lead Case)

Maria Mendoza, et al.,
Plaintiffs,

and
United States of America,
Plaintiff-Intervenor,

v.
Tucson Unified School District, et al.
Defendants.

No. CV-74-0204-TUC-DCB
(Consolidated Case)

ORDER

1 On September 6, 2018, the Court considered the District's assertion that it had
2 attained unitary status for USP § IX provisions, Facilities and Technology. The District
3 reported its development of two indexes, the Facilities Conditions Index (FCI) and the
4 Technology Conditions Index (TCI), which are reviewed to determine capital expenditures
5 to be made under the Multi-Year Facilities Plan and Multi-Year Technology Plan. The
6 Court does not repeat here its discussions related to the Special Master and Plaintiffs'
7 responses to the District's submittal for unitary status, but after considering all the data and
8 arguments from all parties and the Special Master's proposed completion plan, the Court
9 ordered the District to perform certain specific tasks to fully comply with § IX of the USP.
10 The Court ordered that Notices of Compliance would trigger reconsideration of unitary
11 status in the context of determining whether any further measures should be undertaken by
12 the District pursuant to this USP provision. (Order (Doc. 2123) at 138-140.)¹

13 **a. Facilities**

14 The Court ordered the District to return to the original FCI formula, including the
15 Educational Suitability Score (ESS), and recalculate the FCI scores based on the most
16 recent FCI data. The Court held that, "assuming those scores demonstrate that Racially
17 Concentrated schools do not have lower FCI scores than those of non-racially concentrated
18 schools, the District shall have attained unitary status." (Order (Doc. 2123) at 139.) On
19 August 30, 2019, the District filed a Notice of Compliance (Doc. 2264).

20 The Mendoza Plaintiffs complain that the FCI Report, dated March 7, 2017,² does
21 not reflect "the most recent FCI data." The District responds by filing "more recent data,"
22 as provided on October 1, 2019, in an appendix to the District's 2018-19 Annual Report

23 ¹ The Court retained jurisdiction over IX.B1.iv and B.4, teacher proficiency in facilitating
24 student learning with technology, for consideration separately. (Order (Doc. 2123) at 138-
25 140.)

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28 ² As noted by the Mendoza Plaintiffs, the District failed to attach the FCI data scores,
but the Notice of Compliance is referencing the 2017-18 DAR, Appendix IX-1 (Doc. 2136-
1 at 1-4). (Mendoza Objection (Doc. 2278) at 3 n. 2.)

1 (2018-19 DAR). Either way, the FCI report reflects that the District has complied with the
2 Court's order to revert to using the original FCI formula and that the scores demonstrate
3 equity. There is no reflection in the data that Racially Concentrated schools have lower FCI
4 scores than those of non-racially concentrated schools. The District's failure to include the
5 most recent FCI data in the Notice of Compliance, assuming the data reflected in the 2018-
6 19 DAR is the most recent data, is indisputably a failure to comply with a direct Order
7 issued by this Court. The District attacks the complaint of noncompliance by "[t]he
8 Mendoza Plaintiffs, who had full access to the data the District was required to file." The
9 Court notes that the Mendoza Plaintiff's Objection to the Notice of Compliance Re: FCI
10 was filed on September 20, 2019, and the 2018-19 DAR was filed on October 1, 2019.
11 Compliance by the District would have saved the Mendoza Plaintiffs and this Court time
12 which has been essentially wasted on a moot point.

13 The evidence before the Court reflects two snapshots in time: one on March 7, 2017,
14 included in the 2017-18 DAR and another, taken at some unknown time, included in the
15 2018-19 DAR. The USP requires the District to assess the conditions of each school site
16 biennially: every other year. (USP (Doc. 1713) § IX.A.2.)³ It does not matter that the
17 District instead keeps the FCI and ESS as living documents, updated on an ongoing basis,
18 and conducts assessments more than every other year. The Court does, however, find that
19 to avoid any future wasting of time or confusion caused by the ongoing nature of the
20 updates to the FCI and ESS that all future FCI reports shall be dated. The Court finds that
21 the District has complied with the directives of the completion plan set out in the Order,
22 issued September 6, 2018, for attaining unitary status related to the USP § IX.A., Facilities
23 Plan.

24 **Technology**

25 At the time of the Court's September 6, 2018, review, the parties had just agreed to
26 revise the TCI to include internet access, which previously had not been measured because,
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28 ³In other words, the District describes the USP as requiring it "to renew the FCI and
the ESS scores biennially." (2018-19 DAR, Appendix IX-1 (Doc. 2308-1) at 5).

1 according to the District, the level of connectivity had been the same for all schools. The
2 Court assumed the District was also complying with an expedited review and comment
3 schedule related to the revision. The Court ordered the District to review the revised TCI,
4 and “to the extent inadequate internet speeds disproportionately affect Racially
5 Concentrated schools,” the Court ordered the District to develop a plan for correcting the
6 disproportionality by the end of SY 2018-19.” (Order (Doc. 2123) at 139.) On August 30,
7 2019, the District filed a Notice of Compliance (Doc. 2263.)

8 Since the Court’s directives, the District has upgraded internet access and main
9 district internet connection. “Every school has the same type of wireless access points,
10 installed to the same minimum density standards.” (TUSD Reply (Doc. 2321) at 2.) “Each
11 school has equipment of the same type and with the same capacity connecting the school
12 to the main District internet connection.” *Id.* It is undisputed that: “(a) there is no disparity
13 in the availability of internet access anywhere in the District, and (b) the entire system is
14 overdesigned with significantly more capacity than is needed at every level at every
15 school.” *Id.*

16 It is also undisputed that the District did not comply with the Court’s directive to
17 engage in an expedited review and comment process regarding the TCI revision. *See e.g.*,
18 (TUSD Reply (Doc. 2321) (criticizing Mendoza’s objections for being outdated after the
19 District’s broad overhaul of its systems, which had already been undertaken when the Court
20 issued the September 6, 2018, Order). It appears that the District tested the system district-
21 wide during the spring of 2018 and spring of 2019,⁴ (TUSD Reply (Doc. 2321) at 3), but
22 did not comply with the Court’s order to include the internet access scores in the TCI. The
23 District argues it is unnecessary to measure internet access in the TCI because all schools
24 have the same level of connectivity. *Id.* at 4.

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26 ⁴ The USP requires a biannual (twice a year) assessment of technology, USP § IX.B,
27 as compared to the biennial (every other year) facility assessment, USP § IX.A. The Court
28 questions whether the difference is due to need. In the event any directive of the Court,
including the Consent Decree, is no longer viable due to changed circumstances, the
District should at least ask for a directive from the Court to amend, modify or waive such
provision. It is not appropriate to simply ignore express directives issued by the Court.

1 The Court rejects the District's excuse for non-compliance with the Court's order
2 to include internet access in the TCI. It does not matter that all the schools may currently
3 have the same internet access score, this may not be the case in the future as internet
4 technology changes.⁵ The District shall comply with the Court's order to add a measure of
5 internet access for each school to the TCI. (Special Master's R&R (Doc. 2321) at 3
6 (recommending internet access be added to TCI and assessed during next regular testing
7 of capacity.)

8 **Accordingly,**

9 **IT IS ORDERED** that the Special Master's Reports and Recommendations (Docs.
10 2345, 2348, 2350 and 2357) are ADOPTED IN PART AND DENIED IN PART.

11 **IT IS FURTHER ORDERED** that the work set out in the completion plan for
12 attaining unitary status related to the USP § IX.A., Facilities Plan, is finished.

13 **IT IS FURTHER ORDERED** that all future FCI reports shall be dated.

14 **IT IS FURTHER ORDERED** that within seven days of the filing date of this
15 Order, the District shall file the revised TCI, reflecting the heretofore agreed measurement
16 for internet access as applied to the data generated in the spring 2018 and 2019 internet
17 access tests, and refile the TCI.

18 Dated this 15th day of November, 2019.

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Honorable David C. Bury
United States District Judge

⁵ The Court notes that the internet footprint for each school varies depending on the size of the school. (Reply, Ex. D (Doc. 2263-1) at 101-204.)